FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 692

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

—against—

LAURA MOSS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION

RICHARD STEES,
61 Broadway,
New York 6, N. Y.,
Counsel for Respondent.

ALBERT BLUMENSTIEL,
220 Broadway,
New York 7, N. Y.,
Attorney for Respondent.

Bernard D. O'Donnell, 32 Nassau Street, New York, N. Y.

INDEX

PAGE

OPINIONS BELOW 1

STATEMENT OF FACTS 2

ARGUMENT 3

I.—The decision of the Circuit Court of Appeals that the mandatory provisions of Section 29 of the Judicial Code (28 U. S. C. A., Sec. 72) were not modified in any respect by the enactment of the Federal Rules of Civil Procedure is correct 3

II.—The dismissal of the action originally instituted in the District Court was not *res adjudicata* of the issue raised in this suit. 6

III.—The retention of jurisdiction of this action would not unduly burden interstate commerce nor violate the commerce clause of the Constitution 7

CONCLUSION 9

CASES CITED

	PAGE
Anderson v. Abbott, 321 U. S. 349, 355 (1944).....	6
Baltimore & Ohio Railroad Company v. Kepner, 314 U. S. 44, 54	8
Banque de France v. Supreme Court, 287 N. Y. 483, 487	8
Barnett v. Texas & P. Ry. Co., 145 Fed. (2d) 800..	8
Burley Irr. Dist. v. Ickes, 116 Fed. 2d, 529, at p. 538; 312 U. S. 687.....	6
Canadian Pacific Railway Co. v. Sullivan, et al., 126 Fed. (2d) 433 (1st Circuit 1942; 316 U. S. 696)	7
Freeman v. Bee Machine Co., Inc., 319 U. S. 448 (1943)	5
General Investment Co. v. Lake Shore & M. S. R. Co., 260 U. S. 261 (1922), 276.....	4
Greenberg v. Giannini, et al., 140 Fed. 2d 550.....	5
International Milling Company v. Columbia Transportation Company, 292 U. S. 511, 521.....	7
Jacobowitz v. Thompson, et al., 141 Fed. (2d) 72...	8
Lee v. Chesapeake & Ohio R. Co., 260 U. S. 653.....	4, 5
Miles, et al. v. Illinois Central Railway, 315 U. S. 698, 701, 702, 705.....	8
Missouri-Kansas Pipe Line Co. v. United States, et al., 312 U. S. 502.....	6
Neirbo Co., et al. v. Bethlehem Shipbuilding Corporation, Inc., 308 U. S. 165.....	5
St. Louis, S. W. Ry. v. Alexander, 227 U. S. 218...	7

PAGE

Seaboard Rice Milling Co. v. Chicago, Rock Island & Pacific Rway Co., 270 U. S. 363..... 4

Tennessee Valley Authority, et al. v. Tennessee Electric Power Company, et al., 90 Fed. 2d 855 (6th Circuit 1937); 301 U. S. 710..... 4

Tootle, et al. v. Coleman, et al., 107 Fed. 41; 183 U. S. 695 4

Young v. Higbee Company, et al., 324 U. S. 204 (1945) 6

AUTHORITIES AND STATUTES CITED

Section 29 of the Judicial Code; 28 U. S. C. A., Sec. 72 ..... 3, 4, 5

Section 51 of the Judicial Code; 28 U. S. C. A., Sec. 112 ..... 3, 4, 6

Section 38 of the Judicial Code; 28 U. S. C. A., Sec. 81 4

Rule 82 Federal Rules of Civil Procedure..... 5

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 992

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

—against—

LAURA MOSS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief for the Respondent in Opposition

Opinions Below.

The opinion of the District Court for the Southern District of New York filed April 26th, 1946 (R. 26-28) is reported in 67 F. Supp. 38.

The opinion of the Circuit Court of Appeals for the Second Circuit filed November 12th, 1946 (R. 31-36, inc.) is reported in 157 F. 2d 1005.

Statement of Facts.

This action was brought in the Supreme Court of the State of New York to recover damages for personal injuries suffered by the respondent while riding as a passenger on one of the petitioner's trains from Florida to New York. The occasion of her injuries was a collision in North Carolina between the train on which respondent was riding and the derailed cars of another train operated by the petitioner (R. 15). Service in the action was regularly made, and the petitioner has voiced no objection to it. After removing the cause to the District Court of the United States for the Southern District of New York, the petitioner moved to dismiss for improper venue, *res adjudicata* and because the retention of jurisdiction would unconstitutionally burden interstate commerce. The District Court granted the motion on all grounds and the Circuit Court of Appeals reversed (R. 31; 157 F. 2d 1005).

Respondent is a citizen of Pennsylvania. Petitioner is incorporated in Virginia and runs trains between New York and Florida, both ways. It has no license to do business in New York, but it maintains offices there for the transaction of its financial affairs, for the sale of tickets, and for the solicitation of business (R. 22, 23). While petitioner does not regard itself as the operator of its own through trains in and out of New York, its reason appears to be only that between New York and Richmond, where its own roadbed begins, its trains use the rails and the crews of another carrier (R. 10). However that may be, the petitioner does in New York a substantial part of its interstate railroad business, as the court below found (R. 32), and the petitioner does not contend otherwise now.

Before instituting the present action, in the state court, the respondent brought a suit on the same facts in the District Court for the Southern District of New York. On the petitioner's motion, that suit was dismissed solely because jurisdiction was "founded only on the fact that the

action is between citizens of different states," in which event, as § 51 of the Judicial Code goes on to provide, "suit shall be brought only in the district of the residence of either the plaintiff or the defendant." (R. 18, 19, affirmed, 2 Cir., 149 F. 2d 701.)

On removing the present action, the petitioner set up the same objection, professing not to notice that § 51 of the Judicial Code has no application to anything except a suit originally brought in the district court. Regardless of having itself invoked the jurisdiction of the district court, the only district court which has jurisdiction on removal is, "the district court to be held in the district in which such suit is pending" (§ 29 of the Judicial Code; 28 U. S. C. A., Sec. 72). The petitioner nevertheless asserts that the venue is improper. There is nothing to support that assertion, and the Federal Rules of Civil Procedure have no relation to the subject. The companion argument about *res adjudicata* is equally without substance; nothing decided in the former suit is even remotely involved in this one.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals that the mandatory provisions of Section 29 of the Judicial Code (28 U. S. C. A., Sec. 72) were not modified in any respect by the enactment of the Federal Rules of Civil Procedure is correct.

Petitioner does not question that it was validly served with process in this action. The venue of a removed suit is determined by Section 29 of the Judicial Code (28 U. S. C. A. 72) which provides that removal shall be had "into

the district court to be held in the district where such su is pending."

It is a novel idea that Section 51 of the Judicial Co (28 U. S. C. A., Sec. 112) can apply to a removed actio

In *General Investment Co.* v. *Lake Shore & M. S. Co.*, 260 U. S. 261 (1922), at page 276, this Court wrote

> "* * * the venue on removal is specifically dea with and fixed by section 29."

In *Lee* v. *Chesapeake & Ohio R. Co.*, 260 U. S. 65 it said:

> "Section 51 of the Code relates to the venue suits *originally* begun in those courts, and provide subject to exceptions not material here, that— (655)
>
> * * * Section 29 deals, among other things, wi the venue on removals, and shows that in every i stance the removal *must* be into the district cou 'in the district where such suit is pending'; and th requirement is emphasized by section 53 * * *." (657.) (Italics supplied.)

See also *Seaboard Rice Milling Co.* v. *Chicago, Rock Island & Pacific Rway Co.*, 270 U. S. 363.

Tennessee Valley Authority, et al. v. *Tennessee Electric Power Company, et al.*, 90 Fed. 2d 855 (6th Circuit 1937); certiorari denied 301 U. S. 710.

Petitioner erroneously contends that Rules 81(c) and 12(b) of the Federal Rules of Civil Procedure have modified the mandatory provisions of Section 29 of the Judicial Code. The identical argument was advanced with respect to Section 38 of the Judicial Code (28 U. S. C. A., Sec. 81), effective since 1901, and rejected by this Court.

Tootle, et al. v. *Coleman, et al.*, 107 Fed. 41; certiorari denied 183 U. S. 695.

Rule 82 of the Federal Rules of Civil Procedure is conclusive:

> "Rule 82. *Jurisdiction and venue unaffected.* These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein."

It is obvious, therefore, that the Federal Rules of Civil Procedure were not intended in any way to modify, amend or affect the venue provisions of the Judicial Code.

Petitioner devotes the major portion of its argument under Point I to a consideration of *Freeman* v. *Bee Machine Co., Inc.*, 319 U. S. 448 (1943). It does not contend that the decision is in point but rather that it is an indication of a prospective intent on the part of this Court to reverse its long standing interpretation of Section 29 of the Judicial Code. Speaking for the majority in that case, Mr. Justice Douglas emphasized that the question of venue was not before the court and might be waived if not seasonably asserted. He pointed out the distinction between fundamental jurisdictional defects, which may always be raised as a defense, and venue. In denying an application to amend the complaint to allege a cause of action under the Clayton Act, the Court held that as such cause could not have been pleaded in the state court, where the suit was instituted, plaintiff was barred from amending the complaint. Mr. Justice Douglas cited with approval *Lee* v. *Chesapeake & Ohio R. Co.*, 260 U. S. 653, and *Neirbo Co. et al.* v. *Bethlehem Shipbuilding Corporation, Inc.*, 308 U. S. 165.

In *Greenberg* v. *Giannini, et al.*, 140 Fed. 2nd 550, the only other decision relied upon by petitioner, Judge Learned Hand wrote with respect to venue:

> "* * * We infer that this has arisen from the assumption that upon removal those conditions of venue must exist in the district court which are required in an original action. That is, with deference, plainly a mistake; section 72 of Title 28 U. S. C. A. governs the venue of a removed action; section 112 has nothing to do with it" (p. 553).

II.

The dismissal of the action originally instituted in the District Court was not *res adjudicata* of the issue raised in this suit.

Under Point II of its memorandum petitioner fails to cite a single authority in support of its somewhat curious contention that the decision applying Section 51 of the Judicial Code to the former suit, originally brought in the district court, is a preclusive adjudication so far as this action is concerned.

In the prior action, originally instituted in the district court, the sole determination was the applicability of Section 51 of the Judicial Code (28 U. S. C. A., Sec. 112). In holding that the section required a dismissal, Judge Cox took pains to point out:

> "With this disposition, it is unnecessary to consider the second ground of the motion" (R. 19).

It is elemental that if issues involved in a suit are not identical, the doctrine of *res adjudicata* is inapplicable.

> *Young* v. *Higbee Company, et al.,* 324 U. S. 204 (1945).
> *Anderson* v. *Abbott,* 321 U. S. 349, 355 (1944).
> *Burley Irr. Dist.* v. *Ickes,* 116 Fed. 2d, 529, at p. 538; certiorari denied, 312 U. S. 687.

In *Missouri-Kansas Pipe Line Co.* v. *United States, et al.,* 312 U. S. 502, the appellant contended, among other things, that a decision on a prior motion was binding. Mr. Justice Frankfurter wrote:

> "The earlier denials involved different legal claims from that now asserted, and, therefore, are no bar to the present proceeding" (p. 508).

III.

The retention of jurisdiction of this action would not unduly burden interstate commerce nor violate the commerce clause of the Constitution.

Whether the defense of a particular action in a particular place would impose an unnecessary burden on interstate commerce is a question of fact.

> *International Milling Company* v. *Columbia Transportation Company,* 292 U. S. 511, 521.
>
> *St. Louis, S. W. Ry.* v. *Alexander,* 227 U. S. 218, 227.

That a trial of an action in the district court may impose some burden on a defendant is not sufficient in itself to warrant a holding that Article I, Section 8, of the Constitution of the United States would be violated. It must appear that an undue burden would be imposed. The record is totally barren of facts to support petitioner's assertion.

A similar situation was considered in *Canadian Pacific Railway Co.* v. *Sullivan, et al,* 126 Fed. (2d) 433 (1st Circuit 1942; certiorari denied, 316 U. S. 696). The court said at page 438:

> "The question in cases of this sort is not whether the requirement that a foreign carrier shall submit to suit in a state imposes some burden upon interstate commerce, it is whether that requirement imposes an unreasonable burden upon such commerce (citations). To solve this question no verbal formula is available. Each case must be considered as it arises, and prior decisions of the Supreme Court of the United States in cases involving the question are our only authoritative guides."

It might be observed that the railroad company contended in that case, as the petitioner does here, that its trains were not operated by it within the State of the forum but rather by the crew and over the tracks of a connecting carrier. That argument was held insufficient.

See also *Miles, et al.* v. *Illinois Central Railway,* 315 U. S. 698, 705.
Baltimore & Ohio Railroad Company v. *Kepner,* 314 U. S. 44, 54.

The petitioner does not question the validity of the service of process and it is certainly doing business in New York City (R. 22, 23).

Miles, et al. v. *Illinois Central Railway (supra),* at pp. 701, 702.
Barnett v. *Texas & P. Ry. Co.,* 145 Fed. (2d) 800.
Jacobowitz v. *Thompson, et al.,* 141 Fed. (2d) 72.

In the case at bar it is impossible to conceive how interstate commerce or the petitioner itself would be unduly burdened through the retention of jurisdiction in New York. Petitioner's trains run daily into Pennsylvania Station in New York City; its farthest crew lives overnight from the courthouse.

Finally the petitioner advances the absurd contention that the Federal court to which the petitioner removed this action should dismiss it because the state court would have had discretion to do so if the petitioner had elected to leave it there. Except where the Constitution forbids, a state court may decide for itself whether to dismiss or to entertain any transitory action arising outside the state and brought by a non-resident against a foreign corporation (*cf. Banque de France* v. *Supreme Court,* 287 N. Y. 483, 487). The only reason suggested by the petitioner for its asserted belief that the state court would have dismissed

this action is the notion that retention of the action would be an unconstitutional restraint on interstate commerce. That is, of course, a Federal question, and it has been answered by a Federal court on the facts of this particular case. The court below has found that no such burden would be imposed (R. 34).

CONCLUSION.

As nothing substantial is presented for review, the petition should be denied.

Dated: New York, March 3rd, 1947.

Respectfully submitted,

RICHARD STEEL,
61 Broadway,
New York 6, N. Y.,
Counsel for Respondent.

ALBERT BLUMENSTIEL,
225 Broadway,
New York 7, N. Y.,
Attorney for Respondent.